UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

NETLIST, INC., Plaintiff, vs. SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA, INC., SAMSUNG SEMICONDUCTOR, INC., Defendants.	Case No. 2:21-CV-463-JRG JURY TRIAL DEMANDED **Filed Under Seal**

PLAINTIFF NETLIST INC.'S SUR-REPLY TO SAMSUNG'S *DAUBERT* MOTION AND MOTION TO STRIKE EXPERT TESTIMONY OF DAVID KENNEDY (DKT. 205)

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A. Mr. Kennedy Apportioned to the Incremental Benefits of the Patents-in-Suit

Mr. Kennedy apportions to the value of the patents-in-suit through his technical benefit analysis.[1] Separately, Mr. Kennedy considered whether the parties at the hypothetical negotiation, having determined the apportioned value of the patents-in-suit, would split that value amongst themselves. Mr. Kennedy reviewed the available evidence and determined that [redacted] Dkt. 252 at 11 (Mr. Kennedy also runs alternative scenarios in which there is negotiating over the amount solely related to the technical benefit of the patents). Samsung's damages expert also agreed that Netlist is entitled to [redacted]. Ex. 1 at 294:10-15 ("[redacted]

VirnetX is inapposite to the issue of the bargaining split here. There, the Federal Circuit held anyone invoking the presumption that 50% of profits goes to each party "as applicable to a particular situation must establish [a] fit." *Id.* at 1332. In that case, the assumption was "insufficiently grounded in the specific facts of the case." *Id.* at 1331. Here, Mr. Kennedy's analysis is based solely in the facts of the case and not in any bargaining theorem. And once technical apportionment has occurred, a defendant is not entitled to any share. *Prism Techs. LLC v. Sprint Spectrum L.P.*, 849 F.3d 1360, 1376 (Fed. Cir. 2017) is on point: "A price for a hypothetical license may appropriately be based on consideration of the costs and availability of non-infringing alternatives and the potential infringer's cost-savings." The defendant was not entitled to any of this cost savings. Mr. Kennedy identifies the [redacted]

[1] Samsung's argument that damages should be capped by Samsung's profits is foreclosed by the Federal Circuit. *Powell v. Home Depot U.S.A., Inc.*, 663 F.3d 1221, 1238 (Fed. Cir. 2011) ("[I]t is settled law that an infringer's net profit margin is not the ceiling by which a reasonable royalty is capped.").

[redacted]

Moreover, Mr. Kennedy explains that Netlist has [redacted] which would impact the hypothetical negotiation. Ex. 2 (Kennedy Rpt.), ¶ 576. The Federal Circuit has held that "where, as here, a patentee is unwilling to grant an unlimited license, the hypothetical negotiation process has its limits," and thus an infringer should have no expectation of profit. *Monsanto Co. v. Ralph*, 382 F.3d 1374, 1384 (Fed. Cir. 2004).

Samsung's next argument regarding Mr. Kennedy's use of next-best alternatives makes no sense.[2] First, if Mr. Kennedy's next-best alternatives are not commercially acceptable, that would only render his opinion conservative. It would mean that only worse alternatives (or no alternative at all, given that Samsung did not identify any during discovery or in opening reports) would have been available to Samsung, and thus Samsung would lose even more money by not being able to offer the patents-in-suit. Second, throughout his report Mr. Kennedy makes clear that his analysis is based on commercial availability. E.g., Ex. 2, ¶ 599 ("[redacted]").

B. Mr. Kennedy Properly Uses Licenses to Inform the Hypothetical Negotiation

Both Netlist's technical expert and damages expert identified the [redacted]. As Mr. Kennedy notes, [redacted]. *Id.* ¶ 466. The Accused Products in the litigation that resulted in the license were S/DRAM "memory components

[2] Samsung's footnote 1 is incorrect. [redacted].

and/or memory modules; and/or SDR and/or DDR Controllers." Ex. 3 at 3:27-4:1. [redacted] Mr. Kennedy [redacted]. Ex. 2, ¶ 466. And the license agreement grants rights to "[redacted]. Ex. 2, ¶ 390. To describe the agreement as strikingly similar to the Samsung/Netlist relationship is an understatement. The Federal Circuit holds that one of the primary elements of comparability is "assessing whether the license . . . arises under comparable circumstances as the hypothetical negotiation." *Bio-Rad Lab'ys, Inc. v. 10X Genomics Inc.*, 967 F.3d 1353, 1374 (Fed. Cir. 2020). Dr. Mangione Smith [redacted] Under the section "Comparable Licenses," he [redacted]. Ex. 4 (MS Opening Exx C) at ¶¶ 133-143. Samsung's technical expert likewise spent 8 pages of his report identifying [redacted] Ex. 5 (McAlexander Rebuttal Report) at ¶¶ 689-700. Mr. Kennedy relies on a technical opinion from [redacted]. Ex. 2 ¶ 465. He concludes that the [redacted] *Id.* ¶ 463. He identifies [redacted] *Id.* ¶ 464. He opines that the relationship between [redacted] as discussed above. *Id.*, ¶ 466. He then takes steps to account for the fact that the [redacted] (*Id.*, ¶ 467):

[redacted]

In other words, he will tell the jury that the portfolio effect of the agreement can be assessed by [redacted] The record at trial will also include the number of active US patents [redacted]. Mr. Kennedy explains that "[redacted]" *Id.*, at ¶ 468. Samsung's position is that because Mr. Kennedy did not use the agreement to generate a specific per patent royalty on its own, it cannot be a part of his hypothetical negotiation analysis. Under this theory, every individual component that goes into his hypothetical negotiation would be inadmissible. That is not the law. In *Bio Rad*, the Court noted that it had previously affirmed the use of a lump sum agreement as one of the factors used to establish a running royalty: "*Finjan,* for example, involved a license which related to a lump sum payment rather than a running royalty. 626 F.3d 1197, 1211-12. We affirmed a damages award because the 'differences permitted the jury to properly discount [that license]' *Id.*" *Bio-Rad*, 967 F.3d at 1373-74. *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1212 (Fed. Cir. 2010) in turn emphasized that use of a lump sum agreement is appropriate in front of the jury when it is given the tools to understand the differences:

> Finjan noted multiple differences between the Finjan-Microsoft licensing scenario and a hypothetical negotiation with Defendants. Parr explained that Finjan did not compete with Microsoft but does compete against Secure; that Finjan received significant intangible value from Microsoft's endorsements of Finjan; and that the license involved a lump sum instead of a running royalty. These differences permitted the jury to properly discount the Microsoft license.

Mr. Kennedy affirmatively points out the differences [redacted].

C. Mr. Kennedy's Opinions Comply with the Court's Discovery Order

Netlist disclosed its technical benefit theories in its interrogatories before fact discovery ended and before depositions of its corporate representatives on damages. Ex. 6 at 38-39:

[redacted]

[redacted].

Netlist's 30b6 witnesses provided even more detail. Ex. 7 (Milton) at 10 and Ex. 8 (Hong) at 1:

[redacted]

[redacted]

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Respectfully submitted,

/s/ Jason Sheasby

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CERTIFICATE OF SERVICE

I hereby certify that, on March 3, 2023 a copy of the foregoing was served to all counsel of record.

/s/ Jason Sheasby
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CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

I hereby certify that the foregoing document and exhibits attached hereto are authorized to be filed under seal pursuant to the Protective Order entered in this Case.

/s/ Jason Sheasby
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